

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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In re :  
Review of the Financial Interest and : MM Docket No. 95-39  
Syndication Rules, :  
Sections 73.659 - 73.663 :  
of the Commission's Rules : DOCKET FILE COPY ORIGINAL

**COMMENTS OF KING WORLD PRODUCTIONS, INC.**

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## TABLE OF CONTENTS

	<u>Page</u>
Summary of Position .....	1
The Unique Market Characteristics of First-Run Syndicated Programming Must Be Separately and Specifically Considered .....	2
The Networks Should Not Be Permitted To Enter Into The Business of Syndicating First-Run Programming .....	5
The Networks Should Not Be Permitted To Acquire Financial Interests In First-Run Syndicated Programming That They Do Not Solely Produce .....	9
The First-Run Restrictions Cause No Harm To The Economic Well-Being Of The Networks .....	10

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**COMMENTS OF KING WORLD PRODUCTIONS, INC.**

King World Productions, Inc. ("King World") submits these comments in response to the Notice of Proposed Rulemaking,<sup>1/</sup> in which the Commission seeks comments on whether to permit the remaining financial interest and syndication restrictions to expire. As has been the case throughout King World's participation in this and related proceedings, our comments are limited to the regulatory structure appropriately applicable to the market for first-run syndicated programs.

**Summary of Position**

We will show that what remains of the financial interest and syndication rules in application to first-run programming represents a narrow but important bulwark to the preservation of source and outlet diversity in the over-the-air television marketplace and causes no harm to the economic well-being of the networks. The considerations that led the Commission to maintain these very modest limits on the operations of the three

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<sup>1/</sup> In re: Review of Financial Interest and Syndication Rules, Release 95-144 (April 5, 1995) ("NPRM").

traditional, and still dominant, over-the-air television networks were valid in 1993 and remain so today.

**The Unique Market Characteristics of First-Run Syndicated  
Programming Must Be Separately and Specifically Considered**

A core difficulty that we face in overcoming the presumption in favor of complete repeal of all fin/syn restrictions is the Commission's persistent failure to acknowledge the unique economic and policy considerations that underlie the first-run syndication market in contrast to off-network syndicated programming. The 1983 Tentative Decision did not consider the first-run market at all. See, In The Matter of Evaluation of the Syndication and Financial Interest Rules, 8 FCC Rcd. 3282, 3330 (1993) ("Second Report and Order") (Tentative Decision "contained no specific analysis or record regarding the first-run programming market.").<sup>2/</sup> Although the Commission preserved the rules applicable to first-run syndication when it revisited the matter in 1993, its presumption in favor of expiration did not differentiate between the two markets. See, Second Report and Order 8 FCC Rcd. at 3337. Moreover, on the two occasions when the Court of Appeals reviewed the rules, its determinations were based entirely on network arguments applicable to the syndication of off-network, rather than first-run, programs. See, Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309, 311 (7th Cir., 1994).

The Commission did not make the mistake of confusing the economic and policy considerations applicable to off-networking programming with those applicable to first-

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<sup>2/</sup> The Tentative Decision was reported at 95 FCC.2d 1019 (1983).

run programming in the 1991 decision that produced the rules governing the distribution of first-run programming as they exist today. In that decision, the Commission correctly pointed out that:

First-run syndication is a unique marketplace in which clearance by stations in major markets is critical. Unlike off-network programming, there is no preexisting demand for any particular first-run program; such demand generally must be built on a station-by-station, market-by-market basis. In this environment, clearance by the higher-rated broadcast stations in the major markets is vital, particularly in the top three markets, and most of those stations are owned by the existing broadcast networks.

Evaluation of the Syndication and Financial Interest Rules, 6 FCC Rcd. 3094, 3144-45 aff'd in part and modified in part, 7 FCC Rcd. 345 (1991) ("1991 Order"). The structure of the first-run syndication marketplace has not changed in the intervening four years. The question whether the restrictions on network entry into the first-run syndication market should be permitted to sunset can be rationally resolved only by reference to the particular characteristics of that "unique marketplace."

The issue with respect to network entry into the business of syndicating first-run programming is not now, and never has been, one of monopsony power. Rather, it is whether the networks' control of the primary distribution system through which first-run syndicated programming must pass -- the powerful major market stations owned or affiliated with the traditional networks--threatens the ability of independent producer/syndicators to gain access to that distribution system for newly-launched first-

run programs. Whether the networks should be allowed to acquire a financial interest in first-run programming poses exactly the same question.

In the NPRM, the Commission has correctly recognized that the relevant market is over-the-air television. However, the issues on which it seeks empirical data and economic analysis are largely irrelevant to a proper consideration of the first-run elements of the rules. Matters such as the existence or nonexistence of a "pattern of delay" (warehousing) in the introduction of network programs into the syndication market, the nature and degree of network acquisition of financial interests in the "after market," and changes in the number of independent producers creating and selling television shows "to the networks" (NPRM at paragraph 11) bear not at all on the issue whether there is continuing need for limited safeguards to protect the public interest values that inhere in an independent first-run syndication distribution service as a "structural alternative to network distribution." Comments of Capital Cities/ABC, Inc., in Docket 90-162 at 44-45 (filed November 21, 1990).

Whether the networks should be permitted to syndicate first-run programming is, essentially, a matter of vertical integration. The Commission had it right in deciding the 1991 Order. The issue is whether:

allowing the networks into the first-run syndication business would enable them to exploit their own and affiliated stations so as to either extract rights in or handicap the launch of new programs by independent first-run syndicators.

1991 Order, 6 FCC Record at 3144-45.

As we show in the succeeding sections of these comments, the answer to this question remains today exactly as it was in 1991. The networks still possess sufficient power -- through their owned-and-operated stations and their affiliates -- over the over-air-television distribution system to warrant the retention of restrictions that are "slight" in application to the networks themselves but imperative to the preservation of a competitive alternative to network distribution of programming.

**The Networks Should Not Be Permitted To Enter Into The  
Business of Syndicating First-Run Programming**

Allowing the networks to syndicate first-run programming would produce no public benefits and a "dangerous probability"<sup>3/</sup> of harm to source diversity in the first-run marketplace.

Network entry into business of syndicating first-run programming will yield no net gain in consumer welfare as measured by program diversity. Under the existing rules, the networks are permitted to produce first-run programming in-house without restriction. Second Report and Order, 8 FCC Record at 3328. To the extent that the networks may be said to represent a new "voice" in first-run syndication -- a tenuous proposition at best -- that voice is already present. Moreover, any increase in network production of first-run syndicated programming that might result from repeal of the carefully crafted limitation on network involvement in the first-run syndicated marketplace will be more than offset

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<sup>3/</sup> See, e.g., McDaniel v. The Greensboro News Co., 1984-1 Trade Cases ¶65, 792 at 67, 285 (M.D. N.C., 1983).

by a decrease in the number of "voices" represented by first-run programming offered by truly independent producers and distributors.

The most that can be said in support of allowing the networks to distribute first-run syndicated programming is that such latitude would provide them with a greater incentive to increase their own production of first-run programming. On its face, this outcome may seem neutral. However, if the networks were permitted to vertically integrate the distribution function with their existing ability to produce first-run programming, they could extract greater profits than they now can realize from first-run programming only by leveraging control over the distribution system in ways unavailable to independent syndicators. That outcome is not benign to the public interest values of source and outlet diversity.

It may be that the networks possess no inherent advantage over others, as producers of first-run syndicated programming. However, as distributors of first-run programming, the networks still possess the unique power--through ownership of or affiliation with dominant major markets stations--to control the distribution of first-run syndicated programming. As it did in 1991 and 1993, the record shows that the networks continue to have the power to restrict access to the marketplace by independent syndicator and producers of first-run programming.

In the NPRM, the Commission asked for information with respect to each network's share of the first-run syndicated programming domestic "market." NPRM at ¶11. The question is subject to two interpretations. To the extent that it is meant to measure a network's market share of first-run program production, such shares are, at



present, undoubtedly very small. That is irrelevant: The issue is not monopsony power; it is the network bottleneck power over the critical outlets through which first-run syndicated programming must pass to succeed.

The Commission has incorporated into the record of this proceeding the data that it has compiled in connection with its reexamination of the Prime Time Access Rule ("PTAR"). Although the policy considerations are somewhat different, that data confirms continued control by the networks of the critical distribution gateway. The overwhelming preponderance of first-run programming, aired in prime time or otherwise, is carried on network-owned or network-affiliated stations. See, e.g., King World Comments, in Docket MM 94-123, Attachment 1; Economic Report on Behalf of King World, Association of Independent Television Stations, and Viacom in Docket MM 94-123, at 9-21, 44 ("Economic Report"). The reasons for this pattern are also demonstrated by the data compiled by King World in the PTAR proceeding. Even by market 3 (Chicago), the ratings performance of the average independent station (including for these purposes Fox affiliates) is less than half of that of the average network affiliate in that market. See, King World Comments in Docket MM 94-123 at Attachment 2.

Because of the existing patterns of distribution, one cannot assert with absolute certainty how independent stations would perform during prime time periods if programmed with successful first-run syndicated programs now appearing predominantly on network-owned and -affiliated stations. The record does, however, strongly suggest the conclusion that independent producers and syndicators would, in the absence of the remaining first-run fin/syn restrictions, have a very difficult time launching new first-run

syndicated programs on commercially viable terms. Because of the very nature of the first-run market, all such programs must build audience from the ground up; on independent stations, such programs would also have to overcome the consistently lower audience levels of the stations themselves, as the record in the PTAR proceeding shows. See, e.g., Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd. 3996, 4019-20 (1990); Economic Report at 57-70; King World Comments at Attachments 2 and 3.

The networks will doubtlessly claim that it would be irrational for them to refuse to syndicate first-run programming to their “most willing and eager buyers.” Capital Cities/ABC Inc. v. FCC, 29 F.3d 309, 312 (7 Cir. 1994). In the context of first-run programs, the “most willing”--indeed, virtually the only viable buyers at the present time --are network-owned and -affiliated stations. Because the networks are not now permitted to syndicate first-run programming, there is no means of proving conclusively that network entry into the business of first-run syndication would substantially foreclose access by independent producers and syndicators to those stations. However, the unchanged structure of the first-run syndication marketplace and the continuing competitive imbalance between independent stations and network-owned and -affiliated stations creates a “dangerous probability” that competition into the first-run syndicated marketplace and, as a consequence, source diversity will substantially diminish. Therefore, the existing limitation should not be permitted to expire.

**The Networks Should Not Be Permitted  
To Acquire Financial Interests In First-Run Syndicated  
Programming That They Do Not Solely Produce**

The analysis compelling the conclusion that the networks' ability to acquire financial interests in first-run programming should continue to be limited to programming that is solely produced in-house is parallel and congruent with the result set forth above. The record in this proceeding shows that the networks still have the power "to exploit their owned and operated stations and their web of affiliates . . . to handicap the launch of new first-run programs" by independent syndicators and producers. Second Report and Order at 3329. It is the existence of a financial interest in first-run program series that affords them the incentive to do so.

That the networks will exploit their control over the distribution system when given the incentive to do so is clear even from the limited experience under the existing rules. Shortly after the rules were modified to permit the networks to retain financial interest in solely produced first-run syndicated programming, NBC launched a weekly series called "Memories Then and Now." As required by the rules, the program was distributed by an independent syndicator. Although the program is no longer on the air, in February of 1992, during the series' initial season, it was being carried on 44 stations, of which 31--or more than 70%--were either owned by or affiliated with NBC; tellingly, all of the NBC owned-and-operated stations aired this series. Similarly, for the upcoming season, CBS has announced the launch of a first-run series called "Day and Date." As required by the rules, it too will be distributed by an independent syndicator. Although CBS has not yet announced a final list of stations that will carry the show in its initial

season, the tentative list shows a preponderance of CBS owned-and-operated or -affiliated stations and precious few independent stations or Fox affiliates. One can debate whether these examples are sufficient to establish that the networks will always exploit their control over their owned and affiliated stations to cause the clearance of first-run programs in which they have financial interests. However, what is not open to debate, on the basis of this evidence, is that, when the networks have an incentive to exploit their power over the distribution system upon which first-run programming critically depends, they have exercised it. That, in and of itself, is sufficient to compel the conclusion that the existing restriction, limiting the networks to the acquisition of financial interests only in programs they produce solely in-house, should not be altered.

**The First-Run Restrictions Cause No  
Harm To The Economic  
Well-Being Of The Networks**

Even if the economic well-being of the networks were a relevant consideration, it is perfectly plain that the preservation of the very limited restrictions under which the networks operate with respect to first-run syndicated programming simply do not “pinch”. Capital Cities/ABC Inc. v. FCC, 29 F.3d at 315.

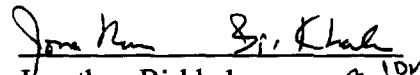
The rules permit the networks to produce (and profit from) as much, or as little, of first-run syndicated programming as they deem best suited to their interests. The only limitation is that they are required to retain independent syndicators to perform the distribution function. If there are substantial economies associated with bringing this function in-house--in a way that does not cause harm to public interest values--the

networks have never made the requisite demonstration of it. The same logic applies to network acquisition of financial interests in programs produced by others. And the same paucity of evidence prevails.

The fact is that--either despite these rules or for reasons wholly unrelated to them --the networks have performed extremely well financially over the past half decade, with the forthcoming season appearing potentially to be their most lucrative ever. See, e.g., "Revenue and Profit Up at Big Four", *Broadcasting and Cable*, p. 8 (April 3, 1995); "Upfront Season, up, up and away" *Mediaweek*, p. 3 (March 13, 1995) (Upfront prime time sales may hit a record \$5 Billion). In addition, the Commission, among other things, has proposed to further relax the multiple ownership restrictions, presumably on the ground that this will further strengthen over-the-air-television in the video marketplace and enable the networks--through increases in the number of stations the networks may own-- to improve upon an already rosy financial picture. Even a modest relaxation of the multiple ownership rules applicable to the networks would exacerbate the power they already possess to control the gateway upon which independent first-run syndication programming critically depends.

In sum, there are excellent, indeed compelling, public interest reasons to preserve the existing narrowly focused and carefully crafted rules limiting network entry into the first-run syndication marketplace. There are no valid, much less compelling, countervailing considerations warranting repeal of these restrictions.

Respectfully submitted,

  
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